

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1 and 17 of the)	WT Docket No. 08-61
Commission's Rules Regarding Public Notice)	
Procedures for Processing Antenna Structure)	
Registration Applications)	

**COMMENTS OF AMERICAN BIRD CONSERVANCY, DEFENDERS OF WILDLIFE,
AND NATIONAL AUDUBON SOCIETY**

American Bird Conservancy, Defenders of Wildlife, and National Audubon Society hereby submit the following comments in response to the Commission's *Public Notice*, DA 08-1078 (released May 6, 2008) regarding "Infrastructure Coalition" *Petition for Expedited Rulemaking* (May 2, 2008) ("Petition") filed in response to the decision of the U.S. Court of Appeals for the District of Columbia in *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) ("Opinion").

American Bird Conservancy (ABC) is a 501(c)(3) non-profit organization dedicated to the conservation of wild native birds in the Americas. Founded in 1994, ABC has long been a leader in Partners in Flight and the North American Bird Conservation Initiative and is the only U.S.-based group dedicated solely to overcoming the greatest threats facing native birds in the Western Hemisphere. ABC has 7,000 members, offices in Virginia and the District of Columbia, and staff in California, Indiana, Missouri, Montana, New Hampshire, New York, and Oregon.

Defenders of Wildlife ("Defenders") is a national, non-profit membership organization dedicated to the protection of all native wild animals and plants in their natural communities, with its headquarters in Washington, D.C. Defenders' mission is to preserve wildlife and emphasize appreciation and protection for all species in their ecological role within the natural environment through education, advocacy, and other efforts. Defenders has over 500,000 members and supporters throughout the country and field offices in several states.

The National Audubon Society, Inc., is a not-for-profit corporation organized under the laws of the State of New York, with its principal office at 225 Varick Street, 7th Floor, New York, New York 10014. National Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. National Audubon has more than one million members and supporters and a presence in all 50 states, including more than 450 certified chapters, its nature centers, sanctuaries, and education and science programs.

Each of these groups has undertaken various efforts to work with the Federal Communications Commission (“FCC” or “Commission”) to reduce mortality caused by communications towers as far back as 1999. For example, each of these groups submitted formal comments to the FCC in response to the Notice of Inquiry, In the Matter of Effects of Communications Towers on Migratory Birds, WT Docket No. 03-187, 18 FCC Rcd 16938 (2003), as well as comments and report from Land Protection Partners in response to the Avatar report on February 14, 2005, in response to Wireless Telecommunications Bureau Seeks Comment on Avatar Environmental, LLC, Report Regarding Migratory Bird Collisions with Communications Towers,” *Public Notice*, 19 FCC Rcd 24007 (WTB 2004), for WT Docket No. 03-187. We request that these comments letters previously submitted into Docket No. 03-187 be incorporated into our response to the *Petition*.

The FCC Wireless Telecommunications Bureau requested submission of comments on the Infrastructure Coalition Petition by May 27, 2008. The Infrastructure Coalition Petition deals only with that aspect of the Opinion in which the court found that the Commission failed to comply with the regulations of the Council on Environmental Quality requiring public involvement in implementing the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§4321 *et seq.*¹ The court remanded to the Commission, among other issues, the determination of “how it will provide notice of pending tower applications that will ensure meaningful public involvement in implementing NEPA procedures.” 516 F.3d at 1035. The court directed the FCC to “proceed with dispatch on remand to resolve the Gulf Coast petition” including the public notice violations under NEPA that form the basis for the Infrastructure Coalition Petition. *Id.* Unfortunately, the Commission appears to have solicited input from industry on how to respond to the Court’s order but failed to seek input of any other stakeholders.

SUMMARY OF COMMENTS

We, collectively referred to as “Concerned Conservationists,” join with the Infrastructure Coalition in requesting an expedited rulemaking for providing public notice and meaningful opportunity to comment on individual proposed tower authorizations as ordered by the court, in either WT Docket 03-187 or the current WT Docket 08-61, whichever cures the statutory violations noted by the court most expeditiously and fairly in full compliance with NEPA. We disagree, however, with the substance of the Infrastructure Coalition Petition on how best to accomplish public notice and opportunity for public comment in the tower registration process as the proposals in the Infrastructure Coalition Petition do not ensure meaningful public

¹ In the Petition, the Infrastructure Coalition has incorrectly asserted that Concerned Conservationists waived their claims that the owners of more than 6,000 individual Gulf Coast antenna structures must prepare or amend pending EAs and therefore the FCC’s rejection of those claims became final notwithstanding that the U.S. Court of Appeals remanded the FCC’s decision. In fact, petitioners asserted, and the court agreed, that the FCC’s failure to give timely public notice of its actions rendered the notice ineffective. The petitioners, concerned citizens, and other conservation groups could not object to decisions they did not know about, as the court of appeals recognized.

involvement in implementing NEPA procedures as ordered by the court. Our comments herein detail our objections to the methodology detailed in the Infrastructure Coalition Petition for complying with NEPA and detail our proposals for how the Commission can best comply with the court's remand by providing adequate public notice and the provision of meaningful opportunity to comment on individual proposed tower authorizations. We will be filing our own petition for expedited rulemaking shortly that will address considerations beyond those raised by the narrow petition filed by the Infrastructure Coalition.

These comments will address the need for adequate notice and timeframes for comment as well as illustrate why the FCC should not model the rules for Antenna Structure Registration ("ASR") applications on the assignment and transfer applications. To address the fundamental issue of adequate notice of ASR applications, the FCC should post the applications on its website and publish them in the Federal Register. The FCC should establish rules on required findings and conclusions under NEPA to be consistent with CEQ guidance. These rules should provide that the FCC cannot delegate its decision-making obligations on environmental impacts to the applicant; the FCC must evaluate the application itself and determine whether the activity fits within the categorical exclusion and then whether it meets the standard for extraordinary circumstances such that it requires environmental analysis notwithstanding the categorical exclusion.

Rather than model the rules after assignment and transfer applications, the rules for filing objections to ASR applications should provide two alternative procedures: a petition to deny and informal objections, both to be due no sooner than 60 days after the filing of the application. These rules should provide that in the absence of a decision by the FCC by whatever due date is established for FCC action, the application will be deemed denied. Before the FCC makes a final decision, it should post its proposed decision on the application, including its tentative decision on environmental impacts and comments from the U.S. Fish and Wildlife Service.

Further, we recommend that, in developing its rules in compliance with the Opinion, the FCC meet with the President's Council on Environmental Quality ("CEQ") attorneys as the CEQ is vested by federal statute with authority over NEPA.² We also suggest that the FCC meet with U.S. Fish and Wildlife Service officials as these professionals have offered since 1999 to meet with the FCC to advance compliance with NEPA, as well as the ESA. Both have the requisite knowledge and expertise to offer proven approaches to compliance.

² The CEQ is an executive body responsible for reviewing "the various programs and activities of the Federal Government in light of the policy set forth in [NEPA]," *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (citing 42 U.S.C. 4344(3)). The CEQ has issued regulations specifying agencies' obligations under NEPA, *see* 40 C.F.R. §§1501-1508, that merit "substantial deference." *Andrus*, 442 U.S. at 358.

BACKGROUND

1. UNREASONABLE DELAYS IN COMPLIANCE WITH NEPA

For nearly a decade, we have been requesting the Commission change its procedures to provide advance notice and meaningful opportunity to comment on all individual proposed tower authorizations and to otherwise comply with NEPA. The petition at issue in *American Bird Conservancy* formally requested (among other remedies) that the Commission implement public participation procedures required by NEPA by providing notice and opportunity to comment on all antenna structure registration applications for the Gulf Coast region, regardless of whether the Commission believes these decisions are categorically excluded from NEPA.

The Commission did not act on the petition until April 2006, after Petitioners twice filed for writ of mandamus in 2003, *In re Forest Conservation Council, Inc.*, Docket No. 03-1034 (D.C. Cir. filed Feb. 13, 2003), and again in 2005. *In re Am. Bird Conservancy, Inc.*, Docket No. 05-1112 (D.C. Cir. filed April 8, 2005). Five days before oral argument, the FCC finally announced that it had imminent plans to take action on the petition, and did so several days following oral argument. See *In the Matter of Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance*, 21 FCC Rcd 4462 (2006) (denying in part, dismissing in part, and deferring in part the Gulf Coast petition). Basically, the FCC action on the Gulf Coast Petition maintained the status quo, but once again the FCC pledged to act in the future on the substance of the Gulf Coast decision. *In re Am. Bird Conservancy, Inc.*, D.C. Cir. Docket No. 05-1112 (Apr. 19, 2006) (dismissing writ as moot).

The Commission has made several commitments to act on its NEPA obligations as contained in the Gulf Coast petition. For example, in 2006 it stated:

We note that as an initial matter, the Commission has considered, where appropriate, the impact that tower constructions have on migratory birds as part of our overall obligation to consider the impact of authorized facilities on the environment. Beyond such considerations, as discussed above, the Commission has issued the *Migratory Bird NOI*, and the Wireless Telecommunications Bureau has subsequently sought comment on the report issued by Avatar that analyzed the existing scientific data on avian collisions with communications towers. Because that proceeding already addresses Petitioners' concerns as to Commission action under the MBTA, we will consider them within that proceeding. As mentioned above, we anticipate issuing a Notice of Proposed Rulemaking in that proceeding in the near future.

In the Matter of Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance, 21 FCC Rcd 4462, 4469 (2006).

Earlier, in 2003, FCC had asserted that it was “moving expeditiously” with respect to migratory bird issues, “because the FCC has imminent plans to devote more institutional time and effort to dangers communications towers may pose to migratory birds,” “‘in the near future’ the FCC would seek input on scientific evidence pertaining to the impact of communications towers on migratory birds,” and “the FCC would reach out to FWS and could obtain the services of a biologist as part of its efforts to address migratory bird issues.” Brief for Respondent FCC at 20-21, *In re Forest Conservation Council, Inc.*, Docket No. 03-1034 (D.C. Cir. filed Apr. 30, 2003).

The FCC also initiated a docket on migratory bird issues in August 2003, after conservationists filed the first mandamus petition. *In Re Effects of Towers on Migratory Birds, Notice of Inquiry*, WT Docket No. 03-187, 18 FCC Rcd 16938 (2003). After taking no action for six months on the Notice of Inquiry and comments, the FCC hired private consultants (Avatar Environmental, LLC, EDM International, Inc., and Pandion Systems, Inc.) in May 2004 to review the comments. The review concluded with the publication of the “Avatar Report,” dated September 30, 2004, on which the FCC also sought public comment. Two years later, the FCC issued the anticipated notice of proposed rulemaking in 2006, seeking comment yet proposing no new rules. *In re Effects of Communications Towers on Migratory Birds*, WT Docket 03-187, Notice of Proposed Rulemaking, 21 FCC Rcd 13,241 (Nov. 22, 2006). More than five years after the initial Gulf Coast petition, the FCC has not acted to change its tower approval process, to provide for better protections of migratory birds and endangered species, or to conform to statutory mandates of NEPA and other environmental laws.

The court opinion in *American Bird Conservancy, Inc.* substantiated our concerns, finding that the FCC violated NEPA regulations, 40 C.F.R. § 1506.6(a), as well as the FCC’s own regulations, 47 C.F.R. § 1307(c), by refusing to provide advance notice and meaningful opportunity to comment on individual proposed tower authorizations. The Court noted the Catch-22 for citizens who wished to file a petition on proposed towers yet were not given notice of tower applications until after FCC approval. 516 F.3d at 1035.

2. THE FCC’S NEPA OBLIGATIONS

NEPA, 42 U.S.C. § 4321 *et seq.*, is “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Section 101 of NEPA contains Congress’ express recognition of “the profound impact of man’s activity on the interrelations of all components of the natural environment,” and declaration that the federal government must “use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony” 42 U.S.C. § 4331(a). NEPA is intended to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” *Id.* § 4321. Moreover, NEPA “insure[s] that environmental information is available to public officials and citizens before decisions are made and before action is taken.” 40 C.F.R. § 1500.1(b), (c) (emphasis added). In order to carry out this mandate, Congress required all federal agencies to act to preserve, protect, and enhance the environment. *See* 42 U.S.C. § 4331(b).

Far from merely announcing abstract principles, Congress “[made] environmental protection a part of the mandate of every federal agency and department.” *Calvert Cliffs’ Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C. Cir. 1971). Realizing that NEPA’s purposes would be achieved “only with great difficulty,” Congress inserted “action-forcing procedures” into NEPA. *Andrus v. Sierra Club*, 442 U.S. 347, 349-50 (1979) (citations omitted). Through these procedures, federal agencies must take a “hard look at [the] environmental consequences” of their proposed actions. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 98 (1983) (citations omitted); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (same); 40 C.F.R. § 1502.1. In so doing, NEPA makes certain “that environmental concerns will be integrated into the very process of agency decisionmaking.” *Andrus*, 442 U.S. at 350.

NEPA requires that “to the fullest extent possible ... all agencies of the Federal Government shall ... include in major Federal actions significantly affecting the quality of the human environment, a detailed statement” addressing “the environmental impact of the proposed action, any adverse environmental impacts which cannot be avoided ... alternatives to the proposed action,” and other environmental issues. 42 U.S.C. § 4332. These requirements serve twin goals. First, “[they] ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Methow Valley*, 490 U.S. at 349. As the implementing regulations make clear, NEPA “is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c).

Second, NEPA “guarantees that the relevant [environmental] information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Methow Valley*, 490 U.S. at 349. By thoroughly collecting and analyzing this data, federal agencies educate not only themselves, but also other governmental actors and the public, about the environmental ramifications of their proposed action.

Prior to preparing an EIS, an agency may prepare an Environmental Assessment (“EA”) – a document meant to provide “sufficient evidence and analysis for determining whether to prepare an environmental impact statement [(“EIS”)] or a finding of no significant impact.” 40 C.F.R. § 1508.9(a). The regulations dictate that an EA must include a full and fair discussion “of the need for the proposal, of alternatives as required by [NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” *Id.* § 1508.9(b). Under certain carefully defined circumstances, the EA may lead to a Finding Of No Significant Impact (“FONSI”) explaining “why an action ... will not have a significant effect on the human environment”, a determination that obviates the need to prepare a full EIS. *Id.* § 1508.13.³

³ Accordingly, “[a]n agency’s refusal to prepare an [EIS] is arbitrary and capricious if its action might have a significant environmental impact.” *State of North Carolina v. FAA*, 957 F.2d 1125, 1131 (4th Cir. 1992) (emphasis added); *LaFlamme v. Federal Energy Regulatory Comm’n*, 852 F.2d 389, 397 (9th Cir. 1988) (same). *See also Blue Mtns Biodiversity Project v. Blackwood*,

The substantive content of an EA is parallel to that of an EIS. *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 565 n.2 (9th Cir. 2000); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998). For example, the requirement for analysis of a reasonable range of alternatives applies to EAs as well as EISs. *Akiak Native Community v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000).

If the analysis in an EA leads to a finding of no significant impact (“FONSI”), the FCC must supply a statement of convincing reasons as to why the proposed action will not have a significant impact. The FCC must take a “hard look” at environmental consequences, identify areas of concern, and make a convincing case of insignificant impact. *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340-41 (D.C. Cir. 2002).⁴

A federal agency must prepare an EIS when an EA indicates that a proposed action may “significantly affect[] the quality of the human environment.” 42 U.S.C. 4332(C).⁵ Development of alternatives is the heart of the EIS. 40 C.F.R. § 1502.14. CEQ regulations call on the agency to “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated,” “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits,” “[i]nclude the alternative of no action,” and “[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives.” *Id.* § 1502.14 (emphasis added).

161 F. 3d 1208, 1212 (9th Cir. 1998) (an EIS must be prepared if there are substantial questions about whether a project may have a significant effect).

⁴ If the agency finds a significant impact can be reduced to insignificance via mitigation, it must also make a convincing case that impacts will be so reduced. *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340-41 (D.C. Cir. 2002).

⁵ In evaluating the significance of an action, agencies must analyze local, as well as national, impacts and must also consider “both short- and long-term effects.” 40 C.F.R. § 1508.27. This discussion must address “appropriate mitigation measures” that the agency could take to reduce the adverse environmental effects of its proposed action. *Id.* § 1502.14(f).

Significance is measured by the context and intensity of the action. *Id.* § 1508.27. Context means that the action and its impacts must be considered in several contexts: national; regional; and local. *Id.* § 1508.27(a). Intensity refers to the severity of the environmental and includes consideration of the degree to which the action affects unique wetlands, ecologically critical areas, historic and cultural resources, or threatened or endangered species; the degree to which these impacts may be controversial, unique, uncertain, or unknown; whether the action is related to other actions with a cumulatively significant impact; and whether the action violates federal law or other requirements for environmental protection. *See id.* § 1508.27(b).

This critical document must also contain a detailed discussion of the “effects” of the agency’s action.⁶ These include both “direct effects,” that are “caused by the action and occur at the same time and place,” and also “indirect effects,” that are “later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(a), (b). The definition of “effects” also includes “cumulative effects,” *id.* § 1508.25(c), which the regulations define as the “incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* § 1508.7.

According to CEQ regulations, agencies shall include in their NEPA procedures “[s]pecific criteria for and identification of those typical actions ... [w]hich normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions ...).” *Id.* § 1507.3(b)(2)(ii). Agencies must also set forth exceptions to actions generally considered to be categorically excluded and for which an EA or EIS must be prepared. *Id.* § 1508.4.

NEW FCC RULES AND PRACTICE TO COMPLY WITH THE COURT’S OPINION

1. ALL TOWER REGISTRATIONS AND RE-REGISTRATIONS MUST CEASE UNTIL THE COMMISSION IS IN FULL COMPLIANCE WITH NEPA, ESA, AND MBTA.

As noted above, we support an expedited rulemaking on the public notice and input portion of the Opinion as well as expedited rulemaking on all other aspects of the Opinion, including finalization of action pledged to the court by the FCC on Migratory Bird Treaty Act (“MBTA”) compliance issues.⁷ In the interim, additional steps are needed to ensure compliance with NEPA and the Endangered Species Act (“ESA”).

⁶ Effects and impacts are used interchangeably in the CEQ regulations. 40 C.F.R. § 1508.08.

⁷ There should be no legal dispute that the FCC is subject to the MBTA. *See* 516 F.3d at 1031 (holding the MBTA applies to federal agencies) (citing *Humane Soc’y of the United States v. Glickman*, 217 F.3d 882, 885-86 (D.C. Cir. 2000)). The FCC should now be aware that the MBTA has no scienter requirement; it applies to both intentional and unintentional bird deaths. Furthermore, the type of act that takes migratory birds is also irrelevant; the MBTA is not limited in application to acts of hunting or poaching. *See generally United States v. Moon Lake Elec. Ass’n. Inc.*, 45 F.Supp. 2d 1070, 1073-75 (D. Colo. 1999) (noting that the MBTA, 16 U.S.C. § 703, prohibits taking and killing “by any means or in any manner” and that “it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge”). The FCC is also subject to the ESA and NEPA. *See* Notice of Proposed Rulemaking in the Matter of Effects of Communications Towers on Migratory Birds, 71 Fed. Reg. 67,510, 67,511 (Nov. 22, 2006) (The FCC has “determined that construction of communications towers requires compliance with environmental responsibilities under NEPA and the ESA.”).

The FCC should immediately cease all registrations and re-registrations of antenna structures until the Commission's review procedures are compliant with the court's ruling on the NEPA and ESA claims.⁸ Although the court deferred decision on the MBTA claim, that issue should be addressed at the same time as the other claims. During the time in which the FCC is complying with the remand case, the status quo must be maintained in order to prevent an irretrievable commitment of resources and environmental harm due to any towers that are constructed in violation of environmental regulations. Because there is "a strong public interest in meticulous compliance with the law by public officials," *Fund for Animals v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1999), the FCC should not approve tower registrations that could result in preventable harm to migratory birds and other species until the Commission articulates and implements a process for approval that is consistent with its statutory obligations.

Any antenna registrations approved by the FCC before the Commission has obeyed the mandatory court order to comply with environmental laws will constitute an irretrievable commitment of resources within the meaning of NEPA.⁹ The court of appeals in this case held that the FCC must provide for meaningful public comment and conduct an environmental assessment (EA) on ASRs in specified circumstances because towers may have a significant impact on the human environment. If the Commission is granting registrations or re-registrations in a manner that violates the court's ruling, the Commission will have "essentially locked itself

⁸ The necessity of ceasing tower approvals and registrations until the FCC is in compliance with federal laws has been brought to the attention of the Commission. See Letter from Jennifer C. Chavez, Earthjustice, to Kevin J. Martin, Chairman, FCC (March 20, 2008).

⁹ 40 C.F.R. § 1506.1 provides:

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action: (1) Is justified independently of the program; (2) Is itself accompanied by an adequate environmental impact statement; and (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

into a position which [binds] it to a certain course of action ... before it has completed its NEPA review.” *Fund For Animals v. Norton*, 281 F.Supp.2d 209, 229 (D.C. Cir. 2003) (where the FWS issued 14 swan depredation permits before conducting an EA, Maryland was preliminarily enjoined from acting on an improperly issued permit to take swans). Here, the FCC should not act on any ASRs until the required process is completed. The approval of registrations will preclude the FCC from effectively reviewing proposed tower construction in compliance with its statutory and regulatory obligations because the resources to build the towers will then be irretrievably spent by applicants before an environmental assessment can be made and any necessary consultation with the FWS can be completed to evaluate the impact on the human environment and species listed under the ESA. See *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C.Cir. 1983) (holding that when a federal agency charged with administering an oil and gas leasing program chooses not to retain authority to preclude all surface disturbing activities, it violates NEPA, and an EIS assessing the full environmental consequences of leasing must be prepared before commitment to any actions that might affect the quality of the human environment.).

It cannot be seriously questioned that approving an ASR constitutes an irretrievable commitment of resources. Resources are irretrievable and agency action is precluded when the federal agency issues the permit, lease, enters into the contract, or otherwise allows a course of action to proceed before NEPA review is completed. See *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 49 (D.C. Cir. 1999) (holding that an irreversible and irretrievable commitment of resources occurred when oil and gas leases were issued). While the towers could theoretically be taken down after construction, nothing in the case law suggests that commitments of resources under NEPA are not “irretrievable” because a structure can be later taken down. See *Metcalfe v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000) (holding that an irreversible and irretrievable commitment of resources occurred where federal agency entered into a contract with an indigenous tribe to authorize and fund whaling activities prior to preparing an environmental assessment of the impacts of such activities); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718-19 (9th Cir. 1988) (voiding contracts awarded prior to preparation of EA). Here, especially where the court’s order held that the FCC had not adequately explained how it was complying with the ESA and remanded that issue as well as the NEPA issue, there is further reason to halt all registrations and re-registrations pending completion of this rulemaking.

2. THE COMMISSION MUST ADOPT RULES TO PROVIDE ADVANCE NOTICE AND MEANINGFUL OPPORTUNITY TO COMMENT ON INDIVIDUAL PROPOSED TOWER AUTHORIZATIONS.

A. NEPA REQUIREMENTS FOR PUBLIC INVOLVEMENT AND ENVIRONMENTAL REVIEW

We urge the FCC to adopt regulations that provide public notice of pending tower applications and NEPA documents, require NEPA analysis of effects of these permitting actions on the environment, and allow for public involvement in the NEPA process.

In determining the process for appropriate public notice and meaningful opportunity to comment and for the Commission to seek out information concerning the environmental consequences of its ASR tower program, the Commission must adhere to NEPA and its implementing regulations. These are not guidelines, but laws and regulations.

Under its current NEPA rules, the FCC has categorically excluded nearly all towers it registers from environmental review. 47 C.F.R. § 1.1306. Categorical exclusions (“CE”) are categories of actions “which do not individually or cumulatively have a significant effect” 40 C.F.R. § 1500.4(p). However, the FCC must provide for “extraordinary circumstances” where an excluded action may have a significant effect. *Id.* § 1508.4. Any action within one of these categories must be subjected to enough environmental review to determine if it meets any of the extraordinary circumstances.

Narrow set of extraordinary circumstances. The FCC has set forth only a few narrowly defined categories of extraordinary circumstances in its regulations. *See* 47 C.F.R. § 1.1307. These categories include the approval of facilities that are to be located in a designated wilderness area or wildlife preserve; facilities that may affect threatened or endangered species; facilities that may affect cultural or historic resources listed or eligible for listing on the National Register of Historic Places; facilities that are located in a floodplain; facilities “whose construction will involve significant change in surface features;” and facilities that are to be equipped with high intensity light in residential areas. 47 C.F.R. § 1.1307(a); *see also id.* § 1.1307(b).

By contrast, CEQ’s NEPA implementing regulations and executive orders offer a much broader definition of significance. For example, in assessing the intensity of the environmental impact, NEPA regulations measure significance by additional factors such as whether the effects are highly controversial, 40 C.F.R. § 1508.27(b)(3), whether the action may establish a precedent for future actions, *id.* § 1508.27(b)(6), whether the action will have uncertain, unique or unknown risks, *id.* § 1508.27(b)(5), and whether the action may violate federal law or requirements for the protection of the environment, *id.* § 1508.27(b)(10). In addition, executive orders direct agencies to consider broad impacts. *See e.g.* executive order directing agencies to minimize and mitigate adverse impacts on migratory birds, E.O. 13186 of Jan. 10, 2001: Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3,853 (Jan. 17, 2001); executive order requiring examination of effects on low income or minority populations, E.O. 12898; executive order on access to and use of Indian sacred sites, E.O. 13007; and executive order on the introduction or spread of non-native species, E.O. 13112.

Environmental Review of Categorical Exclusions. To fulfill the twin goals of NEPA, the FCC must inform the public of its reliance on a categorical exclusion and facilitate public involvement in its NEPA analyses. When an agency acts without an EA or an EIS, the agency must adequately explain its decision. *Alaska Ctr. for the Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999). Whether invoking a CE or a FONSI, the agency cannot merely assert a less than significant impact, but supply convincing reasons for its assessment. *Id.*

In spite of this, the current practice of the FCC is to delegate its NEPA responsibilities to the applicant, who evaluates – without any documentation – whether a particular project may have a significant impact. 47 C.F.R. §1.1308. As the FCC admits:

Thus, the Commission’s environmental rules require licensees, license applicants, and others subject to those provisions to evaluate, prior to construction, whether a proposed tower within one of the specified categories of facilities may have significant environmental impact. In those instances where a site-by-site license, construction permit, or antenna structure registration is required for the facility, the entity must certify compliance with the environmental rules on the appropriate application form. If an EA is not required, the party may proceed with the project without providing any environmental documentation to the Commission. However, if there would be a potential environmental impact, an EA must be submitted with the application for the Commission to determine if the action would have a significant impact on the environment.

In the Matter of Effects of Communications Towers on Migratory Birds, *Notice of Proposed Rulemaking*, WT Docket No. 03-187, 21 FCC Rcd 13,241, 13,247-48 at ¶ 11 (2006) (footnotes omitted) (emphasis added). A guidance form for some of the application forms referred to above expands on this flawed process:

If, after consulting the NEPA rules, a wireless service provider determines that its proposed service facility project does not fall under any of the listed categories in section 1.1307, section 1.1306 states that the licensee may proceed with the project without providing any documentation to the Bureau. Both FCC Form 601 (Application for Radio Service Authorization) and FCC Form 854 (Application for Antenna Structure Registration) contain question 28, which asks whether the licensee's proposed action may have a significant environmental effect requiring an EA. If the licensee indicates “NO” to this question, no environmental documentation is required to be filed with the Commission.

FCC, Compliance with Commission’s Rules Implementing the National Environmental Policy Act of 1969, *available at* <http://www.fcc.gov/wtb/siting/npaguid.html> (emphasis added) (last visited May 20, 2008).¹⁰

¹⁰ The Director of the Fish and Wildlife Service has also urged the FCC to conduct a programmatic EIS on the tower registration program to examine the extent of avian mortality, the causes, and the solutions. Letter from Jamie Rappaport Clark, Director of the U.S. Fish and Wildlife Service (FWS) to William Kennard, Chairman, FCC (Nov. 2, 1999). The FWS Director further noted that “[t]he cumulative impacts of the proliferation of communication towers on migratory birds, added to the combined cumulative impacts of all other mortality factors, could significantly affect populations of many species.” *Id.*

The FWS Director has also advised the FCC that its tower licensing program raises other serious NEPA concerns: “The [FCC] regulations in 47 C.F.R. 1.1307(c) and (d) provide for exceptions

Currently, applicants are not required to submit any data or documentation to validate their claim that no EA is required, and there is no requirement for the FCC independently to review the applicant's assertion. This procedure plainly violates NEPA. *See State of Idaho, et al. v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (noting that an agency's "attempt to rely entirely on the environmental judgments of other agencies" and of the regulated entities was a "blatant departure from NEPA"). The FCC should amend its NEPA regulations and guidance to ensure that its invocation of a CE is justified and preserved for the record and to require an EA pursuant to section 1.1307(c), in addition to section 1.1307(d).

Showing required for "extraordinary circumstance." The current process leaves the FCC and the applicant without a basis for applying the CE. Moreover, if any doubt exists as to whether a CE applies, an agency is prohibited from applying the CE. *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) ("At the very least there is substantial evidence that exceptions to the categorical exclusions may apply, and the fact that the exceptions may apply is all that is required to prohibit use of the categorical exclusion."). The FCC must amend its rules and guidance to ensure agency decisionmaking and documentation supporting its use of a CE.¹¹

All that is necessary to apply an extraordinary circumstance is the "possibility" of a significant effect. *California v. Norton*, 311 F.3d at 1168; *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 481 F.Supp.2d 1059, 1088 (N.D. Cal. 2007). Examples of significant effects are defined in the CEQ regulations, and are defined more broadly by the CEQ than by the FCC. *Compare* 40 C.F.R. § 1508.27 *and* 47 C.F.R. § 1.1307(a), (b). The public can bring these issues to the attention of the FCC and the applicant via informal procedures in the FCC rules, and the FCC

under which an environmental assessment can be required for non-listed species through the submission of detailed justification by either an outside party or FCC. However, these exceptions provide no real protection, since current FCC policy contained in 47 CFR 1.1305 places on licensees, the responsibility of deciding which of their actions require the submission of environmental information. It is our understanding that the licensees routinely pass this requirement on to the contractors building the towers, with almost no environmental oversight by FCC. Because of this interpretation of the intent of NEPA and the limited participation by FCC in the NEPA documentation process substantial losses of migratory birds are not being accounted for in FCC's permit and NEPA decision-making process." *Id.* (emphasis added).

¹¹ *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11th Cir. 2004) (upholding challenge to CE because "it is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision. Post hoc invocation of a categorical exclusion does not provide assurance that the agency actually considered the environmental effects of its action before the decision was made.") (citing *California v. Norton*, 311 F.3d at 1176).

can remedy any deficiencies in the agency's reasoning (e.g., calling for an EA), without invoking the need for the FCC to grant or deny a formal petition.

Public involvement. The FCC must involve the public in its NEPA processes to the maximum extent practicable. 40 C.F.R. § 1501.4(b). CEQ regulations direct agencies to involve the public in implementing NEPA and to provide the public with notice of NEPA-related activities and of NEPA documents, including those who request notice. 40 C.F.R. § 1506.6. The rigid timelines in the petition for expedited rulemaking may not facilitate, and may in fact impede, public notice, review and comment on FCC NEPA documents. *See infra* at 17-19.

The FCC must ensure that it makes enough information available to allow the public to weigh in with informed comment before the agency decision is made. *See Sierra Nevada Forest Protection Campaign v. Weingardt*, 376 F.Supp.2d 984, 991 (E.D. Cal. 2005) (“[the regulations] require that the public be given as much environmental information as is practicable, prior to completion of the EA, so that the public has a sufficient basis to address those subject areas that the agency must consider in preparing the EA). “An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.” *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Corps of Eng’rs*, 511 F.3d 1011, 1026 (9th Cir. 2008).

The FCC must also make an effort to circulate and consult with other affected agencies and those with expertise in the affected environment. *See* 42 U.S.C. § 4332(1)(C)(v), 40 C.F.R. § 1501.4(b) (“The agency shall involve environmental agencies ... in preparing [EAs]”). NEPA procedures promote intergovernmental consultation that will identify and avoid conflicts within an agency, among agencies and between branches of government. *See* 40 C.F.R. § 1502.16(c). Intergovernmental cooperation is essential to allow “other government agencies to react to the effects of a proposed action at a meaningful time.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). Thus, the CEQ regulations require federal agencies to circulate NEPA documents to “[a]ny Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.” 40 C.F.R. § 1502.19(a); *id.* § 1508.9(b) (requiring a “listing of agencies and persons consulted” in an EA). Indeed, one of the main functions of the EIS preparation process is to solicit input from these expert agencies and to modify the environmental analysis accordingly. *Id.* § 1503; *see also id.* § 1506.1 (limiting agency action before NEPA is complete). The FCC should consult with the U.S. Fish and Wildlife Service, the agency charged with the conservation of migratory birds and endangered species, on its ASR program.¹²

¹² The FWS has informed the FCC that tower construction “creates a potentially significant impact on migratory birds.” In fact, the FWS formally requested that the FCC meet with the USFWS to determine those impacts and to identify measures to avoid those impacts. Letter from Jamie Rappaport Clark, USFWS, to William Kennard, FCC (Nov. 20, 2000). On March 21, 2000, then FCC Chairman William Kennard denied the request by FWS Director Jamie Rappaport Clark that the FCC prepare a programmatic EIS “to delineate the potential effect

In an EA, as in an EIS, the FCC must also respond to public comments, *Found. for North American Wild Sheep v. U.S. Dept. of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982), must support its conclusions with detailed information and must make that information available to the public, *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993, 996 (9th Cir. 2004). Fulfilling the public involvement requirements, including the provision of an adequate time for public review and comments, will assist the FCC in taking a hard look at the proposed action and environmental impacts.

Although neither the statute nor the regulations prescribe any length or scope of public comment on a draft environmental assessment, courts have granted injunctive relief based at least in part on a likelihood of success on the merits of NEPA challenges to similarly lacking public comment procedures. *See Fund for Animals v. Glickman*, Civil Action No. 99-245, Tr. Hr'g Mot. for T.R.O. at 59-60 (Feb. 12, 1999) (holding that, where an environmental assessment was prepared in six days, and the public comment period was approximately eight working days, "those kinds of time frames do not allow for any meaningful input even though a couple of dedicated people may have managed."); *Save our Ecosystems v. Clark*, 747 F.2d 1240, 1247 (D. Or. 1984) (holding five day public comment period on a portion of an EA insufficient, remanding for further public comment); *cf. Wroncy v. Bureau of Land Management*, 777 F. Supp. 1546, 1548 (D. Or. 1991) (finding likelihood of success on the merits and granting temporary restraining order based on finding that agency appeared to have made "no effort to make public the environmental assessment . . . in which the [agency] concluded that there would be no significant environmental impact as a result of the . . . project."); *Friends of Walker Creek Wetlands, Inc. v. Bureau of Land Mgmt.*, 19 Env'tl. L. Rep. 20852, 20852 (D. Or. 1988) (holding that the agency failed to provide for any public participation in the EA process and ordering 45 day period for public comment on EA).

Fund for Animals v. Norton, 281 F.Supp.2d 209, 226-27 (D.D.C. 2003).

Similar to public disclosure of an EA, the FCC must also provide public notice of the FONSI. *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 970 (failure to involve or inform public of preparation of EA and FONSI violates CEQ regulations). In some circumstances, the FCC must also allow for public review of a FONSI for thirty days before the action may proceed. 40 C.F.R. § 1501.4(e); *see also* Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (May 24, 1977) (Floodplain Management) (requiring review of proposed activities in floodplains); Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 24, 1977) (Protection of Wetlands) (requiring review of proposed activities in wetlands)

communications facilities may have on the migratory bird population and to institute appropriate mitigation measures.” Letter from William Kennard, FCC, to Jamie Rappaport Clark, FWS (March 21, 2000).

NEPA's statutory and regulatory policy and goals require the FCC to ensure that environmental amenities and values are given appropriate consideration in decisionmaking along with economic and technical considerations and that the public is involved in preparing and implementing their NEPA procedures. The suggested solutions proposed by the Infrastructure Coalition Petition fail to meet these basic requirements.

FCC Review and Evaluation of ASR Applications. The FCC must adopt NEPA rules to ensure compliance for each tower-related action based on its own review and evaluation. "NEPA requires that a federal agency consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003). New FCC rules must provide that the FCC will conduct its own independent analysis, involve the public and affected agencies, afford adequate time for review, make explicit and reasoned findings as to the environmental impact of its actions, and inform the public of those findings.

At present, the FCC has no biologists and no environmental staff capable of independently assessing tower impacts on the environment and, specifically, migratory birds, and does not perform site visits to determine environmental impacts. *See, e.g.,* Holly Berland, FCC Office of General Counsel, *Presentation to the Avian Mortality at Communication Towers Workshop* (Aug. 11, 1999) (explaining that "the FCC does not even have an environmental office" and that "what the FCC does is delegate our environmental responsibilities to our licensees and our applicants" who "kind of check off" whether their own projects have significant environmental effects). Indeed, an FCC guidance document explaining the NEPA review procedures for the agency's tower registration program under 47 C.F.R. Part 17 candidly explains that: "FCC Form 854 (Application for Antenna Structure Registration) contains question 28, which asks whether the licensee's proposed action may have a significant environmental effect requiring an EA. If the licensee indicates "NO" to this question, no environmental documentation is required to be filed with the Commission." FCC, Compliance with Commission's Rules Implementing the National Environmental Policy Act of 1969, *available at* <http://www.fcc.gov/wtb/siting/npaguid.html> (emphasis added). That unlawful delegation of the Commission's obligations to private applicants must be eliminated.

B. PUBLIC NOTICE OF ASR APPLICATIONS

The court in *American Bird Conservancy, Inc. v. FCC* stated that: "We vacate the notice part of the *Order* and remand for the Commission to determine how it will provide notice of pending tower applications that will ensure meaningful public involvement in implementing NEPA procedures." 516 F. 3d at 1035. As the court noted, one part of the solution would be for the Commission to update its website when it receives individual tower applications. In addition, the FCC must augment its notice procedures in conformity with the CEQ regulations for public involvement, 40 C.F.R. § 1506.6. These regulations provide that in all cases the agency shall mail notice to those who have requested it on an individual action. In the case of an action with effects of national concern notice shall include publication in the Federal Register and notice by

mail to national organizations reasonably expected to be interested in the matter. *Id.* In furtherance of the remand order, the FCC must revise its own regulations accordingly.

**C. THE RULES FOR CONSIDERATION OF ASR APPLICATIONS
REGARDING TIME PERIODS FOR PUBLIC COMMENT AND
OBJECTIONS**

The Commission should reject the Infrastructure Coalition's proposal to model the rules for ASR applications after the streamlined spectrum transfer and assignment procedures adopted by the FCC in 2003. The stated purpose of streamlining the procedures for assignments and transfers of control, which had become unwieldy, was to create "flexible policies [which] continue our evolution toward greater reliance on the marketplace to expand the scope of available wireless services and devices." *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20604, 20607 (2003) ("*Secondary Markets Order*"). In particular, the FCC hoped to "encourage licensees to be more spectrum-efficient, promote spectrum fungibility, minimize administrative delays, reduce transaction costs, and otherwise generally facilitate the movement of spectrum toward new, higher valued uses." *Secondary Markets Order*, 18 FCC Rcd at 20683. Those interests have nothing to do with the ASR program and the required environmental review of the location, siting, construction, and operation of a communication tower. This approval and registration process involves the consideration of on-the-ground impacts, including environmental considerations. Nowhere in the *Secondary Markets Order* do environmental concerns come into play, nor is there a discussion of tower construction. The FCC itself recognized that the new transfer and assignment of license rules were too specific to be broadly applied, noting that "the steps taken in the Report and Order are limited in scope, addressing only the legal framework for certain types of leasing transactions involving exclusive use wireless licenses." *Secondary Markets Order*, 18 FCC Rcd at 20687.

This narrow scope of the *Secondary Markets Order* makes practical sense even if the FCC had not been clear on the point. Applications for assignments and transfers of station licenses will only be granted if the FCC finds "that doing so will serve the public interest, convenience and necessity." 47 C.F.R. § 25.119(a). Applications filed with the Public Mobile Service division must demonstrate, among other things: the applicant's qualifications; the applicant's commitment to operate the facility in compliance with all rules governing the Public Mobile Service; and contain any additional information required for the particular application. *See* 47 C.F.R. § 22.107. These application procedures needed to be streamlined "to eliminate regulatory barriers that hind[er] access to the spectrum." *Secondary Markets Order*, 18 FCC Rcd at 20604.

ASR applications, on the other hand, address other considerations. The applicant must fill out an online form, which asks for limited data, and must submit an FAA determination of "no hazard." *See, e.g.,* FCC, Antenna Structure Registration, <http://wireless.fcc.gov/antenna/> (last visited May 23, 2008); 47 C.F.R. § 17.4. These ASR application procedures are already streamlined.

The Commission's rationale for cutting the time period for objections to applications for assignments and transfers does not apply to the consideration of towers. The *Secondary Markets*

Order reduced the objection period from the generally applicable 30 days down to 14 days. In order for the FCC to forbear from the 30 day notice and comment procedure for common carrier licenses under 47 U.S.C. § 309(b), it had to meet the statutory test for forbearance. Under 47 U.S.C. § 10, forbearance from the 30 day period is only allowed if (1) enforcement of the 30 day period is not necessary to ensure that the telecommunications carrier's activities and regulations are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of the 30 day period is not necessary for the protection of consumers; and (3) forbearance from applying the 30 day period is consistent with the public interest. The FCC found that under each prong of the test, a 30-day period for filing objections to assignment and transfer applications was not necessary to achieve the objectives. *Secondary Markets Order*, 18 FCC Rcd at 20684-20685. The FCC was confident that a 14-day period actually helped achieve these objectives, since facilitating application processing promotes more fluid markets, allows less costly and more efficient industry access to the spectrum, and promotes competition - all of which ultimately benefits consumers. *Id.*

The Commission's analysis has no applicability to objections regarding ASR applications or towers in general. Review of license transfer and assignment applications involves consideration of the public interest, convenience, and necessity. Market competition and flexibility are important factors for these considerations. The ASR program is subject to NEPA requirements, and NEPA imposes an affirmative obligation on federal agencies to identify and evaluate the environmental consequences of proposed federal actions. Applying the streamlined spectrum transfer and assignment procedures and their tight timeframes to tower approvals and registrations would frustrate the purposes of NEPA and fail to carry out the court's order.

To ensure meaningful public involvement in the review of ASR applications, the Commission must reject the Infrastructure Coalition proposal to reduce the time frame for public comment on tower registrations from the current 30 days to 14 days. Instead the FCC should consider expanding this time frame to provide meaningful public involvement on tower approvals and registrations as required under NEPA. We would suggest that at least a 60-day period for public comment. Interested parties will need more than 30 days in which to file objections to tower construction applications or request an EA or EIS under NEPA. The determination of environmental impacts cannot be reasonably made in a 14-day time period. An accurate, comprehensive study of impacts must be conducted in order to evaluate whether the requirements of applicable environmental laws, notably NEPA, ESA, and MBTA, are properly met. The FCC has already recognized the need for particularized notice periods in certain contexts, as shown by some of its regulations that allow an objection period of greater than 30 days or give a variable time frame for objections. *See* 47 C.F.R. § 74.787 (giving a period of not less than 30 days for objections to displacement relief applications); 47 C.F.R. § 73.3516 (allowing petitions to deny an application for renewal of license of an existing broadcast station until the end of the first day of the last full calendar month of the expiring license term); 47 C.F.R. § 25.154 (giving a 30-day notice period for objections to common carrier satellite licenses unless the commission extends the deadline).

Furthermore, there are practical considerations for providing a comment period of at least 60 days. It is extremely difficult for members of the public to repeatedly scour the FCC web site,

review new tower applications, examine carefully any environmental effects, look closely at siting, height, guy wire, and lighting issues for each tower, examine potential impacts to migratory birds and other environmental impacts, and then prepare meaningful comments, especially when most ASR applications do not contain sufficient environmental data and none is provided by the FCC. It is unrealistic to think that this work can be accomplished by interested members of the public in less than 60 days.

In sum, for the FCC to fulfill its notice obligation under NEPA, it must give timely notice to the public, solicit information concerning the environmental consequences of proposed FCC actions on tower approvals, provide a meaningful opportunity to comment on individual proposed tower authorizations, and it must make an independent, tentative decision on NEPA compliance, on which the applicant and the public have an opportunity to comment. The record should include, at the time of the notice, comments from the U.S. FWS, so that the public has the benefit of the expert agency's analysis. Short-circuiting this process, as urged by the Infrastructure Coalition in its Petition, will not satisfy the court's mandate.

D. TIME PERIOD FOR FCC REVIEW

The Infrastructure Coalition Petition proposes to impose on the FCC a duty to act within a tight time frame on any objections filed for new tower registrations, or the towers would be deemed approved. We oppose the imposition of any artificial timelines for the FCC to act on individual tower applications and registrations and this back door method for tower approval. Such timelines are not currently in any rule of the FCC, nor should they be. To fulfill its duties under NEPA, the FCC must be better informed of the environmental consequences of its actions, and cutting short the review of tower cases where objections have been filed by the public would undermine the NEPA review process. Such an artificial time frame, especially the short periods suggested in the Infrastructure Coalition Petition, would prevent the FCC from fulfilling its duties under NEPA. Setting such arbitrary time limits would undermine a thorough inquiry into all aspects of the contemplated project and the area to be affected.

We could support a time frame requiring an FCC decision on individual towers of six months from the filing of objections or the completion of an EA or EIS, whichever is later, but only if the consequence of the FCC not acting within the six month period is considered to be a denial of the approval and registration of the tower.

There is no foundation for the Infrastructure Coalition's claim that its proposed time frames are somehow mandated by law of prior FCC policy or practice. In fact, neither the Federal Communications Act of 1996 nor FCC policy compels the procedures and timelines proposed by the Infrastructure Coalition.

The goal of the Telecommunications Act of 1996, the first major overhaul of telecommunications law in almost 62 years, is to let anyone enter any communications business so as to promote competition for the benefit of consumers. The Act uses both structural and behavioral instruments to accomplish its goals: it attempts to reduce regulatory barriers to entry and competition; it outlaws artificial barriers to entry in local exchange markets in its attempt to

accomplish the maximum possible competition; and it mandates interconnection of telecommunications networks and cost-based pricing of leased parts of the network, so that competitors can enter easily and compete component by component as well as service by service. There are no statutory timelines applicable to the review of applications. Rather, the Act focuses on the need for prompt implementation by the FCC of the mandate to promote competition.

The full remarks of Commissioner Jonathan S. Adelstein at a PCIA Wireless Infrastructure Show in October 2007, referenced by the Infrastructure Coalition in its Petition, similarly do not support the Infrastructure Coalition's attempt to ride roughshod over environmental considerations. Commissioner Adelstein's remarks include the statement that he supported the Notice of Proposed Rulemaking in 2006, as he said: to take "a thorough and thoughtful review of the potential effects of communications towers on migratory birds. I believe this rulemaking takes a balanced look at a challenging issue. Migratory birds are a prized natural resource. Conservation of the migratory bird population and their habitats for future generations is an important goal of our society." Nothing in his statement suggests that he would shortcut environmental review of ASR applications.

This concern for impacts on wildlife is echoed in remarks by another commissioner. In comments filed in the April 11, 2006, Commission decision on the Gulf Coast petition and the proposal to prepare a NPRM, Commissioner Michael J. Copps stated:

There is simply no question that bird-tower collisions are a serious problem. The U.S. Fish and Wildlife Service tells us that millions of birds, perhaps as many as 50 million, die each year through such accidents. That is a sobering conclusion coming from the federal agency with the greatest scientific expertise when it comes to wildlife conservation and primary responsibility for protecting migratory birds. The situation imposes a grave responsibility on *this* agency, too, because of our important jurisdiction over tower painting and illumination – a responsibility to make sure that our rules and practices do not contribute to a needless toll of bird deaths.

The Commission could have faced up to this problem years ago. Put bluntly, for too many years this agency treated a widely-recognized problem with not-so-benign neglect. Now we have learned, I hope, that this is not a problem that will just go away if we ignore it. Instead, we need to face up to the hard questions and resolve them in a timely and effective fashion.

We are not faced here with an all-or-nothing choice. Communications towers are essential to modern American life, we all understand that. Without them, we could not watch television, listen to the radio, make cell phone calls, or enjoy the next generation of wireless broadband services. But even as the Commission fulfills its mission to facilitate all these exciting and important technologies, we must also be mindful of the effects we have on the nation's fragile ecosystem. The industries we oversee are backbone industries with effects felt far and wide, including on our environment. We need to be proactive on ecological

preservation, instead of being perceived, as we are by some, as anti-environment or, at best, as some kind of “reluctant environmentalist” dragged kicking and screaming into the Twenty-first century. This kind of agency involvement is something I have pushed for since I arrived here at the Commission in 2001. So I am pleased we are moving in that direction. And I believe that through hard work and a willingness to learn from both conservationists and tower operators, we will find ways to continue encouraging communications technologies while at the same time minimizing ecosystem costs, such as the high avian death toll we have been witnessing. I believe our tentative conclusion about lighting systems represents a good first step in that direction, and I look forward to working with my colleagues to bring this rulemaking to conclusion in the weeks and months – hopefully not years – ahead. Thanks to my colleagues, and to the Bureau, for their good work in developing this item.

In the Matter of Effects of Communications Towers on Migratory Birds, *Notice of Proposed Rulemaking*, WT Docket No. 03-187, 21 FCC Rcd 13,241, 13,278 (2006) (emphasis added).

In light of these concerns, and the legal obligations imposed on the Commission, the basic thrust of the proposal offered by industry should be rejected.

3. THE COMMISSION SHOULD REJECT INDUSTRY’S PROPOSED PROCEDURAL LIMITATION ON THE FILING OF OBJECTIONS THAT WOULD REQUIRE A PETITION TO DENY IN ALL CASES.

The Infrastructure Coalition proposes that “the Commission’s rules should be revised to clarify that any objection on environmental grounds filed against an ASR application must be filed as a Petition to Deny, subject to Section 309(d) of the Act and Section 1.939(d).” In the Matter of Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications, *Petition for Expedited Rulemaking*, WT Docket No. 08-61, at 6, filed May 2, 2008. We respectfully disagree. The existing, rigid FCC rules for Petitions to Deny make sense in the context of licenses, for which they were designed. They were not designed to implement NEPA and would if made the only acceptable method of challenging ARS application, will have the effect of cutting off the public’s ability to participate meaningfully in the NEPA process.

Furthermore, the asserted basis for requiring petitions to deny is unfounded. The Infrastructure Coalition asserts, for example, that while a petition to deny establishes party status for purposes of seeking reconsideration of agency action, filing an informal objection does not. *Id.* at 14 n.52. In fact, under the Act, FCC rules, and long-established practice, any party in interest can challenge an agency action. *See* 47 U.S.C. § 402(a); 47 C.F.R. §1.106. In support of the Coalition’s claim, it cites *Dick Broadcasting Company*, 8 FCC Rcd 3897 (1993). This FCC document involved a petition for reconsideration of FCC’s decision to renew a broadcast license for less than a full term. The FCC did state that an informal objector to a petition for reconsideration does not have “party status”; however, this was for the purposes of 47 C.F.R. § 1.106. This provision is not applicable to objections to tower registrations - it governs only when

a party did not object to agency action in a previous proceeding, but would like to subsequently request reconsideration of the action taken. The provision requires this potential party to give a valid reason why they did not participate in the earlier proceeding, and prove that they have a right to object late. Objections to tower applications do not involve concerns that petitioners did not avail themselves of an earlier opportunity to be involved in the agency's decision and make their position known.

Even in situations that require formal petitions to deny under 47 C.F.R. § 1.106, the FCC may waive this requirement. In *Knox Broadcasting*, 12 FCC Rcd 3337 (also cited by the Coalition), the FCC denied a petition for reconsideration of a denial to extend and modify a construction permit for an AM radio station. The petitioner in *Knox* did not submit a formal "petition to deny" because it was not required for an extension of an AM station permit application. Taking this into account, petitioner was given party status anyway. Finally, the Infrastructure Coalition cites "2004 NHPA," [sic] 20 FCC Rcd 1073 (2004), but nowhere does this document state that informal objectors do not have party status. The FCC should retain its prior practice of considering informal objections to ASRs. For example, *In the Matter of State of Maryland Department of Budget and Management*, 16 FCC Rcd 17130 (2001), granted an application for antenna structure registration, noting that "in performing this independent review, we consider the entire record, including all petitions and objections filed against the environmental assessment." *Id.* at 17135. During the revamping of the antenna structure clearance procedure, *In the Matter of Streamlining the Commission's Antenna Structure Clearance Procedure*, 11 FCC Rcd 4272 (1995), the FCC made no note of requiring objections to be formal petitions to deny in order to grant objectors "party status."


In sum, the Commission should provide the alternative of filing a formal petition to deny only if the time frames are extended and if they are not the exclusive means by which the public can file objections. The public must retain the ability to file informal objections and requests for EAs or EISs in the ASR process. This can be accomplished by adoption of the "permit but disclose" procedures, under which a petition to deny and/or informal comments may be filed.

Furthermore, we urge the Commission to reject the suggestion in the Infrastructure Coalition's Petition, Petition at 8 n. 32, that in any case where an action requires both an ASR application and a service-specific application, the FCC should require that any objections based on environmental consideration must be filed timely against the first-filed application or be dismissed as time-barred. The industry groups argue that allowing a petition to deny based on the second-filed application would interject "inequitable and unnecessary delay." The FCC should reject this proposal. The two applications, although related, are filed for different purposes, raise different concerns, and call for different agency actions. Thus, it would be wholly arbitrary and capricious to require that objections to a second application (that may not have been filed by the time of the passing of the applicable deadline for the first-filed application) may be time-barred based on the filing of a prior, related application. In addition, the Commission should reject the industry's timing limitation on objections because the proposed limitation would appear to prohibit citizens from submitting comments arguing that the EA does not meet NEPA requirements, or from submitting comments arguing that the evidence in the EA triggers the requirement for an EIS under NEPA if that defect becomes evident after

the deadline for objections to the first application has passed. Thus, the limitation proposed by industry is inconsistent with the NEPA requirement for meaningful public involvement in the decisionmaking process.

In conclusion, we urge the Commission to conduct an expedited rulemaking proceeding to address the court's remand and to include in the notice and proposed and final rule the recommendations set forth in this letter and in the forthcoming petition for expedited rulemaking to be filed shortly. Thank you for the opportunity to comment.

Respectfully submitted,



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May 27, 2008

Certificate of Service

I, Kara Gillon, hereby certify that the foregoing comments of ABC, Defenders, and National Audubon Society were served this 27th day of May 2008, by electronic mail, to the following individuals at the addresses below.

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